MADLIS AZID & ORS A

v.

CHUA YUNG KIM & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN B
SUPANG LIAN J
[SUIT NO: S21-62-2009]
21 JUNE 2012

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Notice of motion - Failure to comply with court order - Whether plaintiff permitted to cite first defendant for contempt notwithstanding order of court not personally served - Whether court to dispense with service of order - Rules of the High Court 1980, O. 45 r. 7(7) - Whether defences raised devoid of merits - Whether first defendant in wilful and contumelious breach of order of court - Whether proven beyond reasonable doubt - Whether first defendant found guilty of contempt of court* C D

The plaintiffs, the original owners of each of their respective parcel of 98 pieces of native lands, brought an action to claim recovery of their parcels of land from the first defendant. After a full trial, the court delivered judgment ('the judgment') in favour of the plaintiffs and reinstated the plaintiffs as the rightful owners of the lands. Under item (5) of the judgment, the first defendant was ordered to deliver up the title deeds to each of the 98 parcels of lands to the plaintiffs' solicitors within seven days of the date of judgment. However, the first defendant failed to comply and did not deliver any of the title deeds by the due date. By a notice of motion, the plaintiff sought an order for the first defendant to be committed to prison for contempt of court by reason of his breach of the said judgment. In resisting this motion, the first defendant raised three defences (i) judgment was not served on him personally as required under O. 45 r. 7(2) of the Rules of the High Court 1980 (RHC 1980) and as such he had no or sufficient knowledge of the judgment until service of this notice of motion; (ii) the plaintiffs knew that contempt of proceedings could not commence until he was first personally served with a copy of the judgment and this was not done; (iii) the plaintiffs' solicitors were in conflict of interest arising from a contingency fee arrangement they had with the plaintiffs and had ignored the law relating to contempt in their hurry to obtain the titles in order to claim their interest in the lands. E F G H I

Held (finding first defendant guilty of contempt of court):

(1) Order 45 r. 7(7) permits the plaintiffs to cite the first defendant for contempt notwithstanding that the order of the court was not served on him and for dispensation from service to be granted whether prospectively or retrospectively. The facts showed that the plaintiffs in their statement of claim endorsed in the writ had claimed under prayer (b)(i) the specific order which was item (5) under the judgment. The first defendant therefore knew throughout the legal proceedings including at the delivery of the judgment that this was the main order directed against him. Further, the first defendant knew that judgment was obtained against him when he instructed his solicitors to apply for stay of execution of the judgment. In light of the facts and circumstances, there was no doubt that the first defendant knew the judgment and its terms although it was not personally served on him. It was just for this court to dispense with the service of the order on the first defendant. (paras 13, 14 & 15)

(2) Given the factual situation of the first defendant's knowledge and the court's power to dispense with personal service, the plaintiffs' letter of 17 January 2012 and the intention to serve the judgment personally was mere surplusage. The fact that the process server was unable to serve the judgment under cover of the letter of 17 January 2012 did not change the first defendant's extant knowledge of the judgment. The fact remained that the first defendant had breached and remains in breach of item (5) of the judgment. (para 16)

(3) It was submitted for the first defendant that the plaintiffs' solicitors were interested parties because they had a direct interest in the subject matter as part of the lands would be transferred to them as legal fees, hence the plaintiffs' solicitors should be disqualified from acting on behalf of the plaintiffs. The matter of disqualification of the plaintiffs' solicitors was under a different application and would be dealt with in due course. The judgment obtained in this action has to be performed unless and until it is set aside. The regime and intention of the judgment must be complied with. The application to disqualify looked to be a tactic to distract from the first defendant's own disobedience of the court order. (para 18)

(4) The first defendant had not, to date, delivered up any of the title deeds to the 98 parcels of land in question. The allegations of breach were thus not disputed. The defences raised were devoid of merit. It was proven beyond reasonable doubt that the first defendant was in wilful and contumelious breach of the order of this court and hence, was guilty of contempt of court. (para 19)

Case(s) referred to:

Capital Insurance Bhd v. B S Sidhu [1996] 3 CLJ 477 CA ***(refd)***

Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Ors [2005] 3 CLJ 440 HC ***(refd)***

Davy International Ltd & Others v. Tazzyman & Others [1997] 3 All ER 183 ***(foll)***

Hill Samuel & Co Ltd v. Littaur (Unreported) [1985] Times, 13 April ***(refd)***

Lembaga Tabung Haji v. Metrowangsa Asset Management Sdn Bhd & Anor [2002] 4 CLJ 561 HC ***(refd)***

Robert Doran & Ors v. Kuan Pek Seng @ Alan Kuan & Ors [2011] 1 LNS 670 HC ***(foll)***

Turner v. Turner [1978] 122 SJ 696 ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Woodsville Sdn Bhd v. Tien Ik Enterprise Sdn Bhd & Ors [2011] 10 CLJ 818 HC ***(not foll)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1978, r. 52

Rules of the High Court 1980, O. 45 r. 7(2), (7)

For the plaintiffs - Dr David Fung (Ryan Soo with him); M/s Alex Pang & Co

For the first defendant - Edwin Tsen (Caroline Hee with him); M/s Tan Pang Tsen & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Supang Lian J:

Introduction

[1] By this notice of motion dated 16 February 2012 the plaintiff seeks an order for the first defendant Chua Yung Kim to be committed to prison for contempt of court by reason of his breach of the judgment after trial ("judgment") of this court delivered on 23 December 2011. The breach consisted in his refusing to

comply with the order in item (5) of the judgment by not delivering up the issued document of title in respect of each of 98 parcels of lands as per annexure A to the plaintiffs' solicitors by 30 December 2011.

Background Facts

[2] The plaintiffs are the original owners of each of their respective parcel of 98 pieces of native lands. They brought the action in this case to claim recovery of their parcels of land from the first defendant. On 23 December 2011, this court after a full trial delivered judgment in favour of the plaintiffs. In effect, the judgment reinstated the plaintiffs as the rightful owners of the lands. Under item (5) of the judgment, the first defendant was ordered to deliver up the title deeds to each of the 98 parcels of lands to the plaintiffs' solicitors Messrs Alex Pang & Co within seven days of the date of judgment, ie, by 30 December 2011. A draft copy of the judgment prescient with penal endorsement was sent by the plaintiffs' solicitors to the first defendant's solicitors by letter dated 27 December 2011. The draft judgment was duly approved and returned by the first defendant's solicitors on 30 December 2011. By letter dated 17 January 2012, a sealed copy of the judgment was served on the first defendant's solicitors, Messrs Tan Pang Tsen & Co. The letter contained a penal endorsement to the effect that unless the first defendant deliver the issued documents of title within seven days from the receipt of the judgment, he will be liable to process of execution. On 23 January 2012, the process server of the plaintiffs' solicitors attempted to serve the 1st defendant personally with a sealed copy of the judgment at two separate locations. However, the attempts to serve failed and an affidavit of non-service has been affirmed by the process server on 8 February 2012 (exh. MBA5 in plaintiffs' affidavit in support of this motion). Learned counsel for the plaintiffs hence admitted that there was no personal service of the judgment on the first defendant.

The Plaintiffs' Case

[3] The plaintiffs' case is straightforward. The first defendant is in contempt of court, for he had failed to comply with item (5) of the judgment to deliver up the title deeds to each of the 98 parcels of lands to the plaintiffs' solicitors within seven days from the date of the judgment, ie, by 30 December 2011. It is not

disputed that the first defendant did not deliver any of the title deeds by the due date or until now. The plaintiffs say this is clear disobedience of the court order. Hence, they pray that the court enforce the judgment against the first defendant and mete out sufficient punishment against him for his contempt of court.

[4] This notice of motion for committal of the first defendant is supported by the statement dated 8 February 2012 and the first plaintiff's affidavit in support affirmed on 8 February 2012. Leave to issue the notice of motion was obtained before His Lordship Lee Heng Cheong JC on 10 February 2012. The first defendant had only filed an affidavit to oppose this motion on 15 May 2012 which is three months after the issuance of the motion. The first defendant had insisted that his application filed on 18 January 2012 to stay the judgment be heard before the contempt motion. This court had on 29 March 2012 ruled in sustaining the plaintiffs' argument that the first defendant must first purge his contempt before he can be heard on the stay application.

The Defences

[5] In resisting this motion, the first defendant raises three defences. The first defence is that judgment was not served on him personally as required under Rules of the High Court 1980 ('RHC 1980') and as such he had no or sufficient knowledge of the judgment until service of this notice of motion on 14 May 2012. Secondly, the plaintiffs or their solicitors knew that contempt proceedings could not commence until he was first personally served with a copy of the judgment and this was not done. The letter of 17 January 2012 clearly states that the time given to the first defendant to comply was within seven days from the date of service of the order. Yet the first plaintiff had affirmed his false and misleading affidavit of 8 February 2012 in support of the contempt motion stating that the first defendant was already in contempt when the time had not even begun to run. The plaintiffs' solicitors knew that it was a legal requirement to serve the first defendant personally with the order yet they had no qualms preparing the said affidavit. Thirdly, the plaintiffs' solicitors are in conflict of interest arising from a contingency fee arrangement they had with the plaintiffs and have ignored the law relating to contempt in their hurry to obtain the titles in order to claim their interest in the lands.

A **Personal Service And The First Defendant's Knowledge Of The Judgment**

[6] Learned counsel for the first defendant contended that the effect of O. 45 r. 7(2) of the RHC 1980 is that personal service
B of the order is a prerequisite to the commencement of any committal proceeding for breach of the judgment. Counsel refers the court to the High Court decision in *Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Ors* [2005] 3 CLJ 440 holding that "O. 45 of the RHC envisages personal service on the person
C against whom the order for committal is sought or personal knowledge of the person of the order by either being present when the order was made or being notified of the terms of the order". In another case referred to, ie, *Lembaga Tabung Haji v. Metrowangsa Asset Management Sdn Bhd & Anor* [2002] 4 CLJ 561
D the High Court reiterated the principle that "in order to bring home a charge of contempt of court for disobeying orders of courts those who assert that the alleged contemnors had knowledge of the order must prove the fact beyond reasonable doubt".

E **[7]** Learned counsel for the first defendant contended that the first defendant had no knowledge of the order because he was not given a copy of the plaintiffs' letters of 27 December 2011 and 4 January 2012 enclosing the draft order. Neither was he given a
F copy of the letter of 30 December 2011 from his solicitors returning the approved order as it was not copied to him. Further, the first defendant did not receive the plaintiffs' solicitors letter of 17 January 2012 which was addressed to him. That letter gave him seven days to comply with the terms of the order from the
G date the order is served on him. The letter was to be hand delivered to him. To date, the plaintiffs have not served a sealed copy of the order on the first defendant. Unless and until the sealed order was personally served on the first defendant, there is no failure to comply as the time for compliance can only start to
H run from the date the order is served. As such, the plaintiffs' notice of motion for committal for contempt of court is misleading and without basis as there is no failure to comply.

[8] In addition, counsel for the first defendant argues that the plaintiffs were not genuine in serving the order on the first
I defendant. The first plaintiff had known the first defendant for many years and knew where the order could be served on him. Yet the plaintiffs chose to serve the order on him on the two occasions on 23 January 2012; the first time at 3.30pm at the

Shell Station and the second time at his house at 4.30pm. The first defendant does not understand why the plaintiffs chose to serve the order on him that day which was the first day of the Chinese New Year and a public holiday.

[9] In any event, according to counsel, the first defendant had no intention to wilfully disobey the order of the court. In fact, the first defendant is not aware of any penal notice being endorsed in the draft order as the letter of 27 December 2011 from the plaintiffs' solicitors did not state the penal notice was included.

[10] In response, learned counsel for the plaintiffs says that they admit that there was no personal service of the judgment on the first defendant as was intended under cover of the plaintiffs' solicitors' letter of 17 January 2012. The process server was unable to serve the letter together with the judgment on the first defendant in Beluran on 23 January 2012. His affidavit of non-service is exhibited as MBA5 attached to the affidavit in support (encl. 96). Though that may be, counsel for the plaintiffs argues that the first defendant knew about the judgment and its precise terms when the plaintiffs applied *ex parte* for leave to issue the contempt proceedings. Counsel relied on the saving provision in O. 45 r. 7(7) RHC 1980 as conferring upon this court jurisdiction in the circumstances of this case to waive personal service of the order on the contemnor. Order 45 r. 7(7) reads thus:

> Without prejudice to its powers under Order 62 rule 5, the Court may dispense with service of a copy of an order under this rule **if it thinks it just to do so**. (emphasis added)

[11] Counsel refers to the case of *Robert Doran & Ors v. Kuan Pek Seng @ Alan Kuan & Ors* [2011] 1 LNS 670 (unreported decision of Anantham Kasinather J in the High Court at Kuala Lumpur) where in similar circumstances the court did precisely that in exercising its power where it was just to do so. Counsel submitted that in doing so, the court was on strong grounds in following the English Court of Appeal decision in *Davy International Ltd & Others v. Tazzyman & Others* [1997] 3 All ER 183. The English Court of Appeal in *Davy International*, in turn, had followed the decisions of *Turner v. Turner* [1978] 122 SJ 696 and *Hill Samuel & Co Ltd v. Littaur (Unreported)* [1985] Times, 13 April. In both these decisions, the court was able to dispense with personal service because it was confident that the contemnor not only knew that judgment has been given against him but knew the terms of the judgment.

[12] I would add that one other issue of relevance that His Lordship Anantham Kasinather J had considered in *Robert Doran*, *supra*, is whether O. 45 r. 7(7) empowers the court to dispense with service of the order on the contemnor retrospectively. Referring again to *Davy International Ltd*, His Lordship observed that LJ Morritt, delivering the leading judgment of the Court of Appeal in that case, had in fact considered the question and held that the court has the jurisdiction to make the order of dispensation both prospectively and retrospectively.

[13] Further, in following *Davy International*, above, the learned High Court judge had considered the appellate decision in *Capital Insurance Bhd v. B S Sidhu* [1996] 3 CLJ 477 and the High Court decision in *Woodsville Sdn Bhd v. Tien Ik Enterprise Sdn Bhd & Ors* [2011] 10 CLJ 818 that have favoured a restrictive interpretation of O. 45 r. 7(7). With respect, I agree with the reasons given by the learned High Court judge (at pp. 17-18 of the grounds of decision), for saying that the decision in *Capital Insurance* is not binding and that the High Court decision in *Woodsville* is of no assistance. For the same reasons that the learned High Court judge gave, I would follow the decision of *Davy International Ltd*, and sustain the argument of counsel for the plaintiffs that O. 45 r. 7(7) permits the plaintiffs to cite the first defendant for contempt notwithstanding that the order of the court was not served on him and for dispensation from service to be granted whether prospectively or retrospectively.

[14] Following from this, the further question for this court to determine is whether to dispense with service retrospectively on the facts of this case. As emphasised in *Robert Doran* the discretion is to be exercised in favour of such dispensation only if the court "thinks it just to do so". With respect, I agree with learned counsel for the plaintiffs that personal service of the judgment on the first defendant be dispensed with since the first defendant by the latest on 17 January 2012 knew that the judgment in terms stated therein had been entered against him based on the following facts:

(a) The plaintiffs in their statement of claim endorsed in the writ had claimed under prayer (b)(i) the specific order which is item (5) under the judgment. The first defendant therefore knew throughout the legal proceedings including at the delivery of judgment that this was the main order directed against him. Once he knew he had lost the suit, this would be the main order directed against him;

(b) Throughout these proceedings right up to judgment on 23 December 2011, the first defendant was represented by Messrs Tan Pang Tsen & Co. On the date of delivery of judgment, learned co-counsel for first defendant, Miss Caroline Hee, appeared for the first defendant to take down the judgment which was pronounced in open court at the Sandakan High Court;

(c) The plaintiffs' solicitors sent a draft copy of the judgment prescient with penal endorsement to the plaintiffs' solicitors for approval on 27 December 2011. The first defendant's solicitors duly approved the draft judgment and returned it;

(d) The plaintiffs' solicitors served a copy of the sealed and extracted judgment on the first defendant's solicitors under cover of their letter of 14 January 2012 (MBA4 encl. 96);

(e) The first defendant knew that judgment was obtained against him on 23 December 2011 when he instructed his solicitors to apply to stay execution of the judgment on 16 January 2012 and had affirmed in para. 3 of his affidavit in support (encl. 88) that:

> I have been advised by my solicitors and verily believe that the judgment was obtained against me on 23rd December 2011 before the Honourable Judicial Commissioner Lee Heng Cheong, where His Lordship had, *inter alia*, granted the plaintiffs' claim with costs;

(f) By his summons-in-chambers dated 17 January 2012 (encl. 87), the first defendant was able to pray stay of item (5) as well as the other orders contained in the judgment;

(g) By the first defendant's notice of appeal dated 17 January 2012, he was also able to identify the specific items of the prayer under the statement of claim of this action including prayer (b)(i) which is item (5) of the judgment;

(h) The same firm of solicitors that defended him at the trial and now for the appeal and stay of execution of judgment advise and represent him. As would be expected of any competent and responsible solicitors, they would have advised the first defendant of his rights and duties under the judgment. That is why the first defendant appealed within the one month time period, and made an application to stay the execution of the judgment; and

(i) Subsequently, the first defendant in his affidavits filed in respect of his stay application (encl. 87) had referred to the unsealed copy of the motion, which contains a copy of the sealed judgment, in asking this court to disregard and dismiss the motion.

[15] In light of the facts and circumstances of this case set out above, I agree with counsel for the plaintiffs that there is no doubt that the first defendant knew the judgment and its terms although it was not personally served on him. In my judgment, it is just for this court to dispense with the service of the order on the first defendant. I so order.

The Plaintiffs' Letter Dated 17 January 2012

[16] With respect, I agree with the contention of learned counsel for the plaintiffs that given the factual situation of the first defendant's knowledge and the court's power to dispense with personal service, the plaintiffs' letter of 17 January 2012 and the intention to serve the judgment personally was mere surplusage. The fact that the process server was unable to serve the judgment under cover of the letter of 17 January 2012 on 23 January 2012 does not change the first defendant's extant knowledge of the judgment. The same is true of the time-period given under the letter. It is superfluous. As pointed out by plaintiffs' counsel, and there is no rebuttal of this, solicitors usually, as a matter of giving the offender or debtor an opportunity to redeem himself and thus save the plaintiffs from bringing the matter to court, would extend the opportunity. For example, a debtor though he clearly owes a debt is given say 14 days to pay or else he would be sued in the courts. In any case, with or without the plaintiffs' letter of 17 January 2012, the fact remains that the first defendant has breached and remains in breach of item (5) of the judgment.

Conflict of Interest

[17] It is submitted for the first defendant that the plaintiffs' solicitors Messrs Alex Pang & Co are interested parties. This is because they have a direct interest in the subject-matter as part of the lands will be transferred to them as legal fees. This matter came to light during cross-examination of PW28. It is argued that counsel for the plaintiffs and his firm are in breach of r. 52 of the Legal Profession (Practice and Etiquette) Rules 1978 and Schedule of the Advocates Remuneration Rules 1988 that no lawyer is to take up any matter on a contingency basis. Hence,

the plaintiffs' solicitors should be disqualified from acting on behalf of the plaintiffs. To this end, the first defendant had filed an application (encl. 133) to disqualify the plaintiffs' firm of solicitors from acting for the plaintiffs on grounds of conflict of interest and breach of the rules of professional etiquette.

[18] This argument can be given short shrift by saying that the matter of disqualification of the plaintiffs' solicitors is under a different application and will be dealt with in due course. The judgment obtained in this action has to be performed unless and until it is set aside (see *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210). Whether it is Messrs Alex Pang & Co acting or any other solicitors' firm, the regime and intention of the judgment must be complied with. I agree with counsel for the plaintiffs that there is nothing unusual in taking contempt proceedings when the offending party fails to comply with a mandatory order of the court. The first defendant had all opportunity to apply to discharge the plaintiffs' solicitors ever since he obtained the evidence which he says show the conflict of interest during the cross-examination at the trial of the first plaintiff, but he failed to do so until this contempt proceeding was taken up. I quite agree with counsel that the application to disqualify looks to be a tactic to distract from the first defendant's own disobedience of the court order. Hence, I dismiss this argument as being without merit.

The Finding Of The Court

[19] Nearly six months have lapsed since this court delivered its judgment on 23 December 2011. The fact remains that the first defendant Mr Chu Yung Kim has not to date delivered up any of the title deeds to the 98 parcels of land in question. The allegations of breach are thus not disputed. As regards the defences raised, for the reasons given above, I find them to be devoid of merit. I am satisfied that it is proven beyond reasonable doubt that Mr Chu Yung Kim, the first defendant, is in wilful and contumelious breach of the order of this court of 23 December 2011 and hence, is guilty of contempt of court.